Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications

FEDERAL COURT (PUTRAJAYA) — FEDERAL COURT REVIEW APPLICATION NOS 08–245 OF 2010(A), 08–325 OF 2010(A), 08–463 OF 2010(A) AND 08–104 OF 2011(A)
RAUS SHARIF PCA, AHMAD MAAROP AND HASAN LAH FCJJ
18 JANUARY 2012

Civil Procedure — Jurisdiction — Federal Court — Power of review — Applications to review refusal of leave by Federal Court — Whether court had inherent power to review its own decision — Whether chairman of panel leaving bench during hearing of leave applications constituted quorum failure — Whether there was inordinate delay in making of review applications — Rules of the Federal Court 1995 r 137 — Courts of Judicature Act 1964 s 74

Simpang Empat Plantation Sdn Bhd ('SEP') obtained a credit facility from MBF Finance to purchase a piece of land in the Hilir Perak District ('the land'). The land was charged as security for the loan. When SEP failed to repay the loan, MBf gave notice to terminate the loan facility and appointed a receiver and manager ('the RM') to manage SEP's assets. The RM decided to sell the land by auction and a notice to that effect was published. Gurbachan Singh ('GS'), an advocate and solicitor and partner in the legal firm Tetuan Bachan & Karta ('the legal firm') made a successful bid for the land. GS registered the land under a company called Regal Establishment Sdn Bhd ('Regal'), in which he was a shareholder and director. The representatives of the purchasers and subpurchasers of plots of the land ('the respondents') claimed that they were the rightful beneficial owners of the land and that GS and the legal firm, who were the solicitors representing all the purchasers and subpurchasers of plots of the land, were holding the land on trust for them. The respondents thus commenced an action against GS, the legal firm, the RM of SEP and MBf ('the applicants'). When the High Court dismissed the respondents' claim, they appealed to the Court of Appeal. The Court of Appeal by a majority set aside the High Court's decision and ordered that the respondents hold the land in trust for the unnamed purchasers and subpurchasers of plots of the land, as they had an interest in the land. Dissatisfied with the decision of the Court of Appeal, the applicants separately filed an application for leave to appeal against the decision of the Court of Appeal. The four leave applications were jointly heard and dismissed. The applicants have now proceeded by way of these applications under r 137 of the Rules of the Federal Court 1995 ('the review applications') to move this court to review its decision not to grant leave to the applicants. The applicants submitted that there was a quorum failure during the hearing of the leave applications, in that, the chairman of the three-judge

panel hearing the leave applications had left the bench while the applicants were submitting and that the remaining panel of two judges had continued hearing the matter in his absence. The respondents challenged the applicants' assertion that the chairman of the panel had left the bench for a period before returning and raised the issue that the review applications were not made with all convenient speed as required under r 137 and that they ought to be dismissed on this ground alone.

Held, ordering the leave applications to be reheard by a newly constituted panel:

(1) A review application under r 137 of the Rules should not be equated with an appeal process. As such an inordinate delay in the making of a r 137 application cannot be a determining factor for the refusal of the application, especially in this case where the applicants had explained that they were waiting for the written grounds of judgment of this court rejecting their leave applications (see para 21).

(2) The conflict of evidence in the affidavits of the parties as to whether the chairman of the panel did leave the bench during the hearing of the leave applications was a relevant fact that needed further investigation. After going through the affidavits filed by the parties and the affidavit of an uninterested party, which supported the applicants' version of events, it was found that the applicants' version was more probable. Thus based on the affidavit evidence it was held that the chairman of the panel of judges had left the bench for a period before returning (see paras 32–35).

(3) Section 74 of the Courts of Judicature Act 1964 ('CJA') clearly provided that the Federal Court must hear and dispose the matter by a minimum of three judges. However, in the present case part of the hearing had been conducted by only two judges. Thus, there had been a quorum failure and the decision of the leave application was in breach of s 74 of the CJA. The instant case was another rare but appropriate case for the exercise of the inherent power of this court as envisaged in r 137. As such, the decision of this court on the leave applications was set aside (see paras 37–42).

[Bahasa Malaysia summary

Simpang Empat Plantation Sdn Bhd ('SEP') telah memperoleh empat kemudahan kredit daripada MBf Finance untuk membeli sebidang tanah di Daerah Hilir Perak ('tanah tersebut'). Tanah tersebut dicagarkan sebagai jaminan untuk pinjaman tersebut. Apabila SEP gagal membayar balik pinjaman tersebut, MBf telah memberi notis untuk menamatkan kemudahan pinjaman dan melantik penerima dan pengurus ('PP') untuk menguruskan aset-aset SEP. RM telah memutuskan untuk menjual tanah tersebut melalui lelongan dan notis untuk melaksanakannya telah diterbitkan. Gurbachan

Singh ('GS'), seorang peguambela dan peguamcara dan rakan kongsi dalam firma guaman Tetuan Bachan & Karta ('firma guaman tersebut') telah membuat bidaan yang berjaya untuk tanah tersebut. GS telah mendaftarkan tanah tersebut di bawah syarikat dikenali sebagai Regal Establishment Sdn Bhd ('Regal'), di mana dia merupakan pemegang saham dan pengarah. Wakil-wakil pembeli-pembeli dan sub-pembeli tanah tersebut ('responden-responden') mendakwa bahawa mereka adalah pemilik benefisial yang sah tanah tersebut dan bahawa GS dan firm guaman tersebut, yang merupakan peguam yang mewakili semua pembeli dan sub-pembeli tanah tersebut, memegang tanah tersebut atas amanah untuk mereka. Responden-responden dengan itu memulakan tindakan terhadap GS, firma guaman tersebut, RM kepada SEP dan MBf ('pemohon-pemohon tersebut'). Apabila Mahkamah Tinggi menolak tuntutan responden-responden tersebut, mereka telah merayu kepada Mahkamah Rayuan. Mahkamah Rayuan melalui majoriti mengetepikan keputusan Mahkamah Tinggi dan memerintahkan agar responden-responden memegang tanah tersebut dalam amanah untuk pembeli dan subpembeli yang tidak dinamakan untuk tanah tersebut, kerana mereka mempunyai kepentingan dalam tanah tersebut. Berasa tidak puas hati dengan keputusan Mahkamah Rayuan, pemohon-pemohon secara berasingan telah memfailkan permohonan untuk kebenaran merayu terhadap keputusan Mahkamah Rayuan tersebut. Empat permohonan-permohonan kebenaran tersebut telah didengar bersama dan ditolak. Pemohon-pemohon sekarang ingin meneruskan melalui permohonan-permohonan di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('permohonan-permohonan semakan semula') untuk memohon mahkamah ini menyemak semula keputusannya untuk tidak memberikan kebenaran kepada pemohon-pemohon tersebut. Pemohon-pemohon tersebut telah berhujah bahawa terdapat kegagalan korum semasa perbicaraan permohonan-permohonan kebenaran tersebut, di mana pengerusi panel tiga hakim yang mendengar permohonan-permohonan kebenaran tersebut meninggalkan perbicaraan semasa pemohon-pemohon berhujah dan bahawa panel yang tinggal dua hakim tersebut terus mendengar perkara tersebut tanpa kehadiran beliau. Responden-responden telah mencabar penegasan pemohon-pemohon bahawa pengerusi panel telah meninggalkan perbicaraan buat seketika sebelum kembali semula dan menimbulkan isu bahawa permohonan-permohonan semakan semula tersebut tidak dibuat dengan kadar segera sebagaimana dikehendaki di bawah k 137 dan patut ditolak atas alasan ini sahaja.

Diputuskan, memerintahkan permohonan-permohonan kebenaran didengar semula oleh panel baru:

(1) Permohonan semakan semula di bawah k 137 Kaedah tersebut tidak patut disamakan dengan proses rayuan. Oleh itu kelewatan melampau membuat permohonan k 137 bukan faktor penentu untuk menolak

permohonan tersebut, terutamanya dalam kes ini di mana pemohon-pemohon telah menjelaskan bahawa mereka sedang menunggu alasan penghakiman bertulis mahkamah ini yang menolak permohonan-permohonan kebenaran tersebut (lihat perenggan).

(2) Konflik keterangan dalam afidavit-afidavit pihak-pihak berhubung sama ada pengerusi panel telah meninggalkan sesi perbicaraan semasa perbicaraan untuk permohonan-permohonan kebenaran bersidang adalan fakta relevan yang memerlukan siasatan lanjut. Setelah meneliti afidavit-afidavit yang difailkan oleh pihak-pihak dan afidavit pihak yang tidak berkepentingan, yang disokong oleh versi kejadian pemohon-pemohon, adalah didapati bahawa versi-versi pemohon-pemohon lebih berkemungkinan. Oleh itu berdasarkan keterangan afidavit, telah diputuskan bahawa pengerusi panel hakim telah meninggalkan sesi perbicaraan untuk tempoh seketika sebelum kembali (lihat perenggan).

(3) Seksyen 74 Akta Mahkamah Kehakiman 1964 ('AMK') jelas memperuntukkan bahawa Mahkamah Persekutuan perlu mendengar dan menyelesaikan perkara dengan minimum tiga hakim. Walau bagaimanapun, dalam kes ini sebahagian daripada perbicaraan telah dilaksanakan oleh hanya dua hakim. Oleh itu, terdapat kegagalan korum dan keputusan permohonan kebenaran tersebut telah melanggar s 74 AMK. Kes ini adalah kes yang jarang berlaku tetapi pelaksanaan kes yang teratur merupakan kuasa sedia ada mahkamah ini sebagaimana termaktub dalam k 137. Oleh itu keputusan mahkamah ini berhubung permohonan kebenaran telah diketepikan (lihat perenggan 37–42).]

Notes

For cases on Federal Court, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4897–4906.

Cases referred to

Adorna Properties Sdn Bhd v Kobchai Sosothikul [2006] 1 MLJ 417; [2005] 1 AMR 501, FC (refd)

Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd & another application [2005] 3 MLJ 1; [2004] 5 AMR 709, FC (refd)

Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1, FC (refd)

Bank Negara v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)

Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng [2005] 1 MLJ 101; [2005] 4 AMR 693; [2005] 4 CLJ 29, FC (refd)

Chia Yan Teck & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1; [2001] 4 AMR 3921, FC (refd)

Eng Mee Yong & Ors v V Letchumanan [1979] 2 ML J 212 (folld)

Harcharan Singh a/l Piara Singh v PP [2011] 6 MLJ 145, FC (refd)

A *Joceline Tan Poh Choo & Ors v V Munusamy* [2007] 6 MLJ 485; [2007] 5 AMR 725, FC (refd)

Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, FC (refd)

B *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 AMR 2917, FC (refd)

Raja Petra Kamarudin v Menteri Dalam Negeri [2010] 4 CLJ 25, HC (refd)

Raja Prithwi Chand Lal Choudhury v Sukhraj Rai AIR 1941 SC 1 (refd)

C *Taylor and another v Lawrence and another* [2002] 2 All ER 353, CA (refd)

Uddin (a child), Re [2005] 3 All ER 550, CA (refd)

Vellasamy a/l Ponnusamy & Ors v Gurbachan Singh a/l Bagawan Singh & Ors [2006] 2 MLJ 715; [2006] 1 CLJ 805, HC (refd)

D *Vellasamy a/l Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of lands known as PN 35553, Lot 9108 Mukim Hutan Melintang, Hilir Perak) v Gurbachan Singh a/l Bagawan Singh & Ors* [2010] 5 MLJ 437, CA (refd)

E **Legislation referred to**

Courts of Judicature Act 1964 ss 74, 96, 97
National Land Code s 214A
Rules of the Federal Court 1995 rr 55, 107, 108, 137

F *Malik Imtiaz Sarwar (Harpal Singh Grewal and Jenine Anand Gill with him) (Bachan & Kartar) for the applicants in Civil No 08–245 of 2010(A).*

Cecil Abraham (DP Vijendran, Sunil Abraham and Domnic Selvam with him) (Rajandram Domnic & Co) for the respondents in Civil No 08–245 of 2010(A).

G *Nahendran Navaratnam (Swinder Singh a/l Ram Singh, C Sri Kumar and Brian Foong Mun Loong with him) (Kumar partnership) for the applicant in Civil No 08–325 of 2010(A).*

Cecil Abraham (DP Vijendran, Sunil Abraham and Domnic Selvam with him) (Rajandram Domnic & Co) for the applicant in Civil No 08–325 of 2010(A).

H *Leong Kok Keong (Kean Chye & Sivalingam) for the applicant in Civil No 08–463 of 2010(A).*

Cecil Abraham (DP Vijendran, Sunil Abraham and Domnic Selvam with him) (Rajandram Domnic & Co) for the respondents in Civil No 08–463 of 2010(A).

I *Ling Hua Keong (Mohamad Khairil bin Abidin with him) (Ling & Mok) for the applicant in Civil No 08–104 of 2011(A).*

Cecil Abraham (DP Vijendran, Sunil Abraham and Domnic Selvam with him) (Rajandram Domnic & Co) for the respondents in Civil No 08–104 of 2011(A).

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] There are four applications before us: Application No 8–245 of 2010(A) ('first application'), Application No 8–325 of 2010(A) ('second application'), Application No 8–363 of 2010(A) ('third application') and Application No 8–104 of 2011(A) ('fourth application'). In this judgment, we will refer to the four applications as 'the Review Applications', where the context requires.

[2] The applicants in the review applications were the defendants, while the respondents were plaintiffs before the High Court. For clarity and convenience, where the context requires, we will refer to the applicants in the first application as 'Gurbachan' and 'Tetuan Bachan & Kartar', second application as 'Regal', third application as 'receiver and manager of SEP' and fourth application as 'MBF'. Otherwise, the term 'Applicants' in this judgment refers to the applicants in these four applications.

[3] The applicants in the review applications moved this court to review its decision dated 21 April 2010 in deciding not to grant leave to appeal to the applicants against the decision of the Court of Appeal.

[4] We heard the review applications together on 18 October 2011 and 24 October 2011. At the end of the proceedings, we indicated to the parties that we need some time to consider the submissions and to make our decision. We now give our decision together with the reasons.

BACKGROUND FACTS

[5] Briefly the facts are these. Nam Bee Rubber Estate Sdn Bhd ('Nam Bee') owned a piece of land measuring 3,681 acres in Mukim Hutan Melintang, Hilir Perak District ('the said land'). It was a rubber estate land and was therefore governed by, inter alia, s 214A of the National Land Code ('NLC').

[6] On or about 5 December 1977, Nam Bee purportedly agreed to sell the said land to a company called Syarikat Pembinaan Perusahaan Kemajuan Bhd ('SPPKB') at the purchase price of RM3.2m. However, the transfer of the said land could not be effected. Nam Bee and SPPKB then set up a new company called Simpang Empat Plantation Sdn Bhd ('SEP'), and subsequently transferred the said land to SEP.

[7] In December 1990, SEP obtained from MBf Finance Bhd ('MBf') a

credit facility in the amount of RM2.5m. For that purpose the said land was charged as security to MBf with a debenture, which contained a power of attorney.

[8] SEP failed to repay the loan. MBf demanded payment from SEP for the sum of RM2,809,629.87 as of 30 April 1992. MBf also gave notice to terminate the loan.

[9] On 12 May 1992, based on the debenture, MBf appointed a receiver and manager over SEP's assets and to manage its assets. Thereafter a decision was taken by the receiver and manager of SEP to sell the said land by auction. Notice to that effect was published.

[10] Gurbachan, who is an advocate and solicitor and a partner in a legal firm known as Tetuan Bachan & Kartar, made a successful bid at the auction. Gurbachan executed a sale and purchase agreement, and registered the said land under a company called Regal Establishment Sdn Bhd ('Regal').

[11] The receiver and manager of SEP used the proceed of the sale to redeem the title of the said land from MBf.

[12] The respondents claimed to be the purchasers or subpurchasers of some plots of the said land from SPPKB. They also purported to represent 213 other subpurchasers of plots of the said land. In this judgment, we will refer to all of them as respondents, where the context requires.

[13] In the High Court the respondents, inter alia, asked the court to declare that:

(a) Gurbachan and Tetuan Bachan & Kartar were at all material times the solicitors representing the respondents with a fiduciary duty to the respondents in the purchase of the said land;

(b) Gurbachan was holding the said land in trust for the respondents;

(c) the transfer of ownership of the said land to Regal was null and void; and

(d) the respondents were the rightful owners under the law and the beneficial owners in accordance with the plots owned by them based on their agreements with SPPKB.

FINDINGS OF THE HIGH COURT

[14] The High Court dismissed the respondents' claims after a full trial. The reasoning of the learned trial judge is set out comprehensively in his grounds of

judgment found in [2006] 2 MLJ 715; [2006] 1 CLJ 805. Essentially the learned trial judge held:

(a) the agreements entered into between the respondents and SPPKB were for the purchase of shares but not land. SPPKB was never at any time the registered owner of the said land and thus did not have the legal capacity to transfer the said land to the respondents;

(b) the receiver and manager of SEP had the authority to sell the said land under the terms of the debenture without MBf commencing foreclosure proceedings;

(c) no solicitor-client relationship existed between Gurbachan and the respondents; thus, there was no fiduciary duty owed by Gurbachan to the respondents;

(d) the evidence did not show such a contract between the respondents and Gurbachan and Tetuan Bachan & Kartar. The evidence also had not proved that Gurbachan had manipulated the situation and had exercised undue influence on the respondents. On the contrary, Gurbachan had been open and transparent in his dealings with them; and

(e) the bid to purchase the said land by Gurbachan was made in his personal name and not on behalf of the respondents.

FINDINGS OF THE COURT OF APPEAL

[15] The Court of Appeal by a majority decision reversed the decision of the learned trial judge. The grounds of judgment of the Court of Appeal can be found in [2010] 5 MLJ 437. The minority judgment basically agreed with the findings of facts made by the learned trial judge and his conclusions on the law. However, the majority judgment held:

(a) the respondents had an interest on the said land;

(b) the sale of the said land to Gurbachan did not break the equitable rights of the respondents because:

(i) the MBf charge was invalid as it was registered without the prior consent of the relevant state authority;

(ii) in the absent of consent, the transfer and registration of the said land were invalid and void and the applicants could not override the equitable rights of the respondents, and

(iii) Gurbachan was fully aware of the rights of the respondents and thus he could not be a bona fide purchaser for value without notice. Thus, Gurbachan was bound by the respondents' equity.

(c) the registered ownership of the said land to Regal was equally tainted.

Regal was a company taken over by Gurbachan and therefore was essentially his alter ego. Gurbachan was the promoter, shareholder and director of Regal. Thus, the transfer of the said land in the name of Regal did not break the equity of the respondents because Regal through Gurbachan, had full knowledge of the equitable rights of the respondents of the said land;

(d) all the transaction from SEP to Regal was done with full knowledge of the respondents' rights. The justice of the case demanded that the veil of incorporation be pierced; and

(e) the representation as well as the conduct of Gurbachan together with the string of letters written by Gurbachan and by others to Gurbachan, all categorically established the solicitor-client relationship between Gurbachan and the respondents.

[16] Based on the above grounds, the Court of Appeal by majority, set aside the High Court's decision. It was ordered that the four respondents hold the said land in trust to be transferred and registered in the names of the respondents (which include the 213 unnamed respondents), subject to the consent of the Estate Land Board as required under s 214A of the NLC. It was also ordered that the document of title and document of restriction in title of the said land be amended accordingly subject to the consent of the Estate Land Board.

LEAVE TO APPEAL

[17] Dissatisfied with the decision of Court of Appeal, the applicants separately filed to this court four applications for leave to appeal under s 96 and s 97 of the CJA read with rr 55, 107 and/or 108 of the Rules of the Federal Court 1995 ('leave applications'). In the leave applications the applicants proposed the following questions:

GURBACHAN AND BACHAN & KARTAR

(1) Is a court entitled to lift or pierce the veil of corporate personality on the ground that it is the interest of justice to do so?

(2) Does the sale of land by a non-owner to a purchaser create an equitable interest in the tatter's favour?

(3) Does the equity jurisprudence of Malaysia recognise a remedial constructive trust or only institutional constructive trust?

(4) In what circumstances, if any, may the Court of Appeal make a finding of fraud when the High Court has acquitted a party to a litigation of fraud?

(5) Is it open to an appellate court to find or hold that a registered charge is invalid notwithstanding that such had not been pleaded in the trial court nor raised as a ground in the memorandum of appeal.

(6) Is a lender who takes a debenture and a registered charge of land from a borrower precluded from enforcing its rights under the debenture to sell the security in preference to enforcing its rights under the registered charge?

(7) Whether the fact of a retainer between a solicitor and an individual asserting the existence of a solicitor-client with the formen:-

(i) Can be inferred from conduct of the parties in the absence of a written retainer, and if so

(ii) In the event the services are intended to be performed by the solicitor are of a limited nature, whether:-

(a) This can be equally inferred from the conduct of the parties in the absence of any written communication concerning such limited services; and/or

(b) A presumption that services are not limited arises against the solicitor in the absence of such written communication.

(8) Whether a solicitor is entitled to act in his own interest in respect of a matter in which his clients have an indirect interest where the solicitor fully disclose his doing so to his clients and his clients agree to his doing so?

(9) Whether a fiduciary is entitled to be reimbursed for the expense incurred in securing a benefit later found to be due to those persons to whom fiduciary duties are owed.

(10) Whether the Court of Appeal is entitled to draw and rely on inferences of fact from the evidence of a witness found not to be a witness of truth to interfere with findings of specific fact by the trial judge without:-

(i) First concluding that the trial judge had erred in concluding that the said witness was not credible; and

(ii) Then considering the extent to which the said findings of specific fact of the trial judge were based on the trial judge's preference of a version of fact other than that presented by the said witness.

(11) Whether in interfering with a ruling of the trial judge as to the admissibility of a particular document or the weight to be attached to the said document the Court of Appeal:-

(i) Must have regard to the basis upon which the trial judge had come to his or her conclusion; and

(ii) Must conclude that the basis of the conclusion of the trial judge was wholly, as opposed to partly (if at all), erroneous; and, if so

(iii) Must state its reasons for so interfering by reference to the whole of the decision of the trial judge.

REGAL

(1) Whether interest in a land registered in a document of title could be defeated in a collateral action without any allegations/averments as specified under s 340(2)(a), (b) or (c) of the National Land Code 1965 especially when the Plaintiffs had withdrawn their claim under the above section.

(2) Whether a purchaser of shares/equity in a company which is the owner of the land in good faith and for valuable consideration and without notice of any encumbrance or caveat could rely on the proviso to s340(3) of National Land Code 1965 and acquire good title to the land.

(3) Whether the Court could make an order for the transfer of an alienated land without the consent of the State authority where the title is endorsed with restrictions of interest namely (i) consent of the Menteri Besar; (ii) approval of the Estate Land Board; and (iii) without payment of the required stamp duty, and if it is so made, whether the State authority could refuse to register the said transfer.

(4) Whether s 340(1) of the National Land Code confers an immediate indefeasibility of title upon a purchaser/transferee and whether a registered proprietor could be ordered to transfer the land not to the prior transfer or but to some other person/s.

(5) Whether damages could be awarded against a party who is not privy to the claimant either in contract, in tort or in trust.

(6) Whether a claimant is entitled to trace the subject property which forms part of a land and which cannot be identified by way of tracing in the Malaysian Torrens System of land law by making order that the land be transferred to the claimant as trustee.

(7) In the event the Court finds there is a solicitor-client relationship and/or fiduciary duty on the part of the solicitor, can orders to transfer the land be made in favour of the clients when the solicitor acting as trustee/fiduciary had sold the land in compliance with the laws to a third party.

(8) When 217 claimants enter into 217 separate sale and purchase agreements for different purchase price for different parts of the land or shares in the land and at different dates but with the same vendor of which the terms and conditions of the agreements are not identical, could the claimants bring a representative action pursuant to O 15 Rule 12 of the Rules of the High Court 1980.

(9)

(i) When a Writ of Summons is filed and the prospective party is non-existent and not owner of the land yet could an action be laid against the prospective party by making amendment to the Writ to include such prospective party as a defendant.

(ii) If the answer to the above question is in the positive, do the Plaintiffs have a cause of action against the defendant?

RECEIVER AND MANAGER OF SEP

(i)

(a) Whether the Receivers and Managers of the Applicant could legally sell the said Land by virtue of the powers in the Debenture without the Debenture Holder resorting to foreclosure proceedings under the National Land Code Act 1965 in order to repay the loan owed by the Applicant to the Debenture Holder?; and

(b) If the answer to Question (i) (a) is in the affirmative, then whether such a sale by the Receivers and Managers of the Applicant ought to be treated in

law, as being synonymous with a sale by the Chargor as a result of the Receivers and Managers of the Applicant being the agent of the Chargor?; and

(c) If the answer to Question (i) (b) is in the affirmative, then whether the ratio decidendi of the Supreme Court in *Kimlin Housing Development Sdn Bhd (Appointed Receivers and Managers) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 that a Chargee could not sell and charged under the National Land Code Act 1965 without resorting to foreclosure proceedings should be extended to sales undertaken by the Receivers and Managers of the Applicant as agent of the Chargor vide Power of Attorney granted by the Chargor in the Debenture?; and

(d) If the answer to Question (i) (c) is in the negative, then whether the Court of Appeal was correct when the majority reversed the learned trial Judge's decision that allowed the Receivers and Managers to dispose off and transfer the Land to the Regal?

(ii)

(a) Whether under Section 5 of the National Land Code Act 1965, the definition of 'Restriction in interest' on the title meant that there is no need to apply and obtain the Menteri Besar's consent to transfer the said Land when the Land is sold by the Receivers and Managers of the Applicant who are not the registered proprietor stated in the title?

(b) If the answer to (ii) (a) is in the affirmative then whether the Court of Appeal was correct when in rejecting the learned trial Judge's interpretation abovesaid that there is no need to have the Menteri Besar's consent to transfer the Land to the Mr Gurbachan nominee being the Regal in a sale by the Receivers and Managers of the Applicant in order to settle and repay the loan?

(iii)

(a) When the Respondents are legally required to obtain Menteri Besar's consent to transfer the said Land and also to obtain the Estate Land Board's approval by virtue of Section 214A under the National Land Code Act 1965, whether such persons could acquire any equitable or beneficial interests that will attract the imposition of Trust by the Court without first obtaining such approvals from the relevant Authorities?;

(b) If the answer to Question (iii) (a) is in the negative, then whether the Court of Appeal was correct when the majority decided that the Respondents have equitable and/or beneficial interest that led the Court to impose a Trust in the manner so ordered by the Court of Appeal?;

(iv) Whether Syarikat Pembinaan Perusahaan Kemajuan Berhad (SPPKB) possess the Legal Capacity to speak for and act on behalf of Simpang Empat Plantations Sdn Bhd as alleged by Syarikat Pembinaan Perusahaan Kemajuan Berhad (SPPKB) in its dealing with the Respondent which could result in the transfer of

ownership of the said Land or beneficial interest therein to the Respondent when SPPKB is not the registered Land owner in this case?

MBF

(a) Whether the Respondents are allowed to raise new issue (that is, the Applicant's charge was invalid without the consent of the Menteri Besar) in their submissions when it never pleaded in their Re-Reamended Amended Statement of Claim or raised in their examination in chief during trial;

(b) Whether the Court of Appeal can interfere with the findings of fact of the trial judge without having regard to the grounds relied upon by trial judge in that based on the demeanor and contradictory evidence of the witness (SP8), his evidence is not believed and further, based on the undisputed fact based on the endorsement 'KMB' and 'ada kebenaran' on the memorial of the said charge;

(c) When the approval of Estate Land Board under Section 214A of the National Land Code 1965 and/or the consent of transfer from the Menteh Besar is legally required, whether the Respondents could in law acquire equitable and/or beneficial interest in the Land before the Respondents obtain the approval from the Estate Land Board and/or the consent from the Menteri Besar;

(d) If the answer to Question (c) is in the negative, then whether the Court of Appeal was correct when the majority decision held that the Respondents have equitable and/or beneficial interest in the Land that led the Court of Appeal impose a Trust in the manner so ordered by the Court of Appeal.

[18] The leave applications were jointly heard on 19 April 2010 and then adjourned for consideration. On 21 April 2010, the leave applications were dismissed. A written judgment dated 2 December 2010 was then released. In the opening paragraph of the judgment it was stated that 'Atas permohonan pihak-pihak berkenaan Mahkamah bersetuju mendengar permohonan No. 08(f)364-2009(A) sahaja dan keputusan di dalam permohonan ini akan mengikat ketiga-tiga permohonan lain'. The application in No 08(f)364 of 2009(A) was the application by Gurbachan and Bachan & Kartar. However, in the body of the judgment, essentially, it was held that the questions presented in the leave applications were the same questions which overlap and were not questions of law envisaged under s 96 of the CJA. It was also held that most of the questions were confusing and were academic questions that need not be answered by this court.

ISSUES AND FINDINGS

[19] At the outset Dato' DP Vijendran, learned counsel for the respondents raised the issue of delay on the part of the applicants in making the review applications. He submitted that while r 137 does not prescribe the time within which an application for review must be filed, it must be made 'with all convenient speed'. He suggested that the 'convenient speed' for filling any review application can be determined by taking the normal times prescribed for

filling a notice of appeal, which is one month. Thus, he submitted that the convenient speed to apply for a review would also be one month from the refusal of the leave application.

[20] In the present case, he pointed out that the review applications by Gurbachan and Bachan & Kartar, Regal, manager and receiver of SEP, and MBf were made four months, five months, seven months and 11 months respectively, after the leave applications were refused. Thus, he submitted that the review applications were not made with all convenient speed or within a reasonable time and urged us on this ground alone, to dismiss the review applications.

[21] With respect, we are unable to agree that the time to file an application for review to be one month from the refusal of the leave application. We are of the view that a review application under r 137 should never be equated with an appeal process. While an inordinate delay in making the application may be a factor, it cannot be a determining factor. This is especially so in this case where the applicants had given reasons for the delay in that they were waiting for the written grounds of judgment of this court for rejecting the leave applications.

[22] Thus, what is before us now are applications for this court to review its own decision. In effect, the applicants are asking us to set aside the decision of the earlier panel and have the leave applications reheard by newly constituted panel. The applications are made under r 137 of the Rules of the Federal Court 1995 ('r 137') which provides:

> For the removal of doubts, it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[23] The scope and ambit of r 137 has been dealt with in a number of cases by this court. The most recent decision is in *Harcharan Singh a/l Piara Singh v Public Prosecutor* [2011] 6 MLJ 145. In that case, a five member panel had re-affirmed the view that this court had the inherent jurisdiction to review its own decision in certain limited circumstances.

[24] In *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1, the limit of r 137 was explained by Abdul Hamid CJ (as he then was) at p 6 as follows:

> [4] In an application for a review by this court of its own decision the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstances in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as

A if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may same case on question of law is where the court had applied a B statutory provision that has been repeated. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be C taken up in another appeal in a similar case. That is what is usually called 'revisiting'. Certainly, it should not be taken up in the same case by way of a review. That had been the practice of this court all these years and it should remain so. Otherwise, there will no end to litigation. A review may lead to another review and a further review. This court has so many times warned against such attempts ….

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[25] In the same case, Zaki Tun Azmi PCA (as he then was) had laid out the limited or exceptional circumstances where this court may exercise its discretion to invoke r 137 as follows:

E (a) that there was a lack of coram, eg the court was not duly constituted as two of the three presiding judges had retired (*Chia Yan Teck & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 AMR 3921);

(b) the applicant had been denied the rights to have his appeal heard on merits by the appellate court (*Megat Najmuddin bin Dato' Seri (Dr) Megat* F *Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385, [2002] 1089);

(c) where the decision had been obtained by fraud or suppression of material evidence (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 AMR 2917);

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(d) where the court making the decision was not properly constituted, was illegal or lacking jurisdiction, but the lack of jurisdiction is not confined to the standing of the coram that rendered the impugned decision (*Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd & another application* [2005] 3 MLJ 1; [2004] 5 AMR 709) (*Allied Capital Sdn Bhd*);

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(e) clear infringement of law (*Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417; [2005] 1 AMR 501);

(f) it does not apply where the findings of this court is questioned, whether I in law or on the facts (since these are matters of opinion which this court may disagree with its earlier panel) (*Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng* [2005] 1 MLJ 101; [2005] 4 AMR 693; [2005] 4 CLJ 29);

(g) Where an applicant under r 137 has not been heard by this court and yet

through no fault of his, an order was inadvertently made as if he had been heard (*Raja Prithwi Chand Lal Choudhury v Sukhraj Rai* AIR 1941 SC 1);

(h) where bias had been established (*Taylor and another v Lawrence and another* [2002] 2 All ER 353);

(i) where it is demonstrated that the integrity of its earlier decision had been critically undermined eg where the process had been corrupted and a wrong result might have been arrived at (*Re Uddin (a child)* [2005] 3 All ER 550); and

(j) where the Federal Court allows an appeal which should have been consequentially dismissed because it accepted the concurrent findings of the High Court and Court of Appeal (*Joceline Tan Poh Choo & Ors v V Munusamy* [2007] 6 MLJ 485; [2007] 5 AMR 725).

[26] Despite the long list of circumstances listed above, this court has always been strict in invoking its inherent powers to review its own decision. In fact, over the years there are not many instances where this court had exercised its inherent powers to review its own decision. For an application for leave to appeal, the only occasion where this court has exercised its discretion in reviewing its own decision was in *Allied Capital Sdn Bhd.* Other than *Allied Capital Sdn Bhd,* this court had never overturned its own decision on refusal or granting the leave to appeal ordered by an earlier panel.

[27] In the present case, the applicants like in *Allied Capital Sdn Bhd* are asking us to review the decision of the earlier panel in refusing their applications for leave to appeal. They mount their challenge against the decision of the earlier panel on a number of grounds which may be grouped into three main grounds.

[28] Firstly, it was alleged that the decision of the earlier panel was heard and delivered in contravention of s 74 of the CJA. In short there was a coram failure. Secondly, the hearing of the leave applications was flawed by a breach of natural justice. It was alleged that learned counsel for MBf was not permitted a right to reply even though he had indicated his desire to rebut certain points made by counsel for the respondents. Thirdly, there has been a miscarriage of justice. The complaint by the applicants was that the earlier panel had not dealt with all the questions posed by the respective applicants. It was submitted that while there was agreement between the parties for the leave applications to be heard together, there was no agreement that the ruling in the application by Gurbachan and Bachan & Kartar would bind the other three applications.

[29] Regal, receiver and manager of SEP and MBf submitted that, the application for leave by Gurbachan and Bachan & Kartar, cannot bind them, as distinct questions and issues were raised by them. Regal for example alleged

A that the following issues were not considered by the court:

(a) Regal as a bona fide purchaser of the said land. Regal had bought the interest of the said land from 43 respondents. They had been paid accordingly. But the 43 respondents were amongst the 217 respondents who brought the action and the effect would be that the 43 respondents had not only received the money from Regal but also part of the said land; and

(b) Regal had spent RM60m on improvement of the said land. Evidence of Regal spending RM60m on improvement of the said land were before the High Court and the Court of Appeal as well as before this court.

[30] Similarly, MBF submitted that the questions it raised in particular in relation to s 214A of the NLC was not considered by the previous panel. He pointed out that the issue of s 214A was argued and considered by the High Court and the Court of Appeal. The High Court answered the question in the negative. The majority in the Court of Appeal answered it in the positive while the minority answered it in the negative. However, MBF alleged that this court did not consider the issue at all when rejecting the leave applications.

[31] We will first deal with the issue of coram failure. The applicants submission is that the decision of this court in the leave applications was delivered by a panel that was not duly constituted in accordance with s 74 of the CJA. The applicants contended that although three judges had been empanelled to determine the leave applications and in fact had commenced hearing it, the chairman of the panel, rose and left the bench during submission of counsel for the applicants. And the proceedings were not stood down as the remaining panel members continued hearing the matter in the absence of the chairman. It was submitted that once the chairman left the bench, there was no constituted court within the meaning of s 74 of the CJA which provides:

> 74(1) Subject as hereinafter provided, every proceeding in the Federal Court *shall be heard and disposed* of by three judges or such greater number of Judges as the Chief Justice may in particular case determined. (Emphasis added.)

[32] The applicants have filed no less than seven affidavits, all of which support the assertion that the chairman of the panel had left the bench for a period before returning. However, the allegation was factually challenged by two affidavits filed on behalf of the respondents. The two affidavits basically asserted that none of the three judges had in fact left the bench during the proceedings.

[33] Thus, there is a conflict of evidence on affidavits whether the chairman of the panel did leave the bench. In resolving this issue, we are guided by the

observation of Lord Diplock in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, where at p 217 His Lordship said:

> Although in the normal way it is not appropriate for a judge to attempt to solve conflicts of evidence on affidavit, this does not mean he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it maybe. In making such an order on the application as he 'may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

[34] The above principle was applied by our then Supreme Court in *Bank Negara v Mohd Ismail & Ors* [1992] 1 MLJ 400.

[35] We are applying the same principle in the present case. And after going through the affidavits filed by the parties, we are of the view that the applicants' version of events is more probable. Firstly, in addition to the affidavits by the applicants, affidavits of person without any interest in the proceedings have also been filed in support. In particular, Dato' Bastian Pius Vendargon, counsel who appeared for the Bar Council during the leave applications, had positively affirmed that the chairman of the panel did leave the bench. Secondly, one of the applicants had lodged a police report against the makers of the two documents of the affidavits relied on by the respondents on this issue which stated that one of the judges had left the bench. This underscores the credence of the applicants' version of events. Conversely, the respondents have not lodged any police report nor have they procured an affidavit from any non-interested party to support their version of events. Thus, based on the affidavits evidence available before us, we can safely hold that the chairman of the panel did leave the bench for a period before returning.

[36] The question is, did that constitute a coram failure. The respondents submitted that it did not. This is because the chairman appears only to have stepped out for a brief period before returning. Thereafter, he together with the other two members continued to hear all arguments before the matter was adjourned for a decision. When the decision was delivered, it was a decision of a three man panel.

[37] With respect, we are unable to agree. It is our judgment that the moment the chairman rose and left the bench during the submission of counsel for the applicants, and the remaining panel members continued to hear the submissions, there was then no duly constituted court within the meaning of s

74 of the CJA. This is because part of the hearing had been conducted only by two judges. Section 74 of the CJA had been breached and the hearing became a nullity. This case falls within the limited grounds and very exceptional circumstances in which a review can be made.

[38] In *Chia Yan Teck & Anor v Ng Swee Kiat & Anor*, the application for review under r 137 was allowed on the ground that the court was not duly constituted. In that case, when the judgment was delivered by the deputy registrar on 22 December 2000, there was only one remaining judge, who was capable of exercising his function as a judge. The two other judges had retired before 22 December 2000 although they had signed the judgment earlier.

[39] A more recent case on this issue is the case of *Raja Petra Kamarudin v Menteri Dalam Negeri* [2010] 4 CLJ 25. In that case, at the outset of the hearing, an application was made for recusal of one of the three panel member judges from hearing the matter. The particular judge left the bench and the application for recusal was heard by the two remaining judges who dismissed the application for recusal. Thereafter the other judge was invited to take his seat on the bench to hear the main application. It was ruled that the hearing and decision of the recusal application was in breach of s 74 of the CJA.

[40] Similarly, on the facts of the present case, we hold that there was a breach of s 74 of the CJA. Section 74 of the CJA clearly provides that every proceeding in the Federal Court 'shall be heard and disposed' by a minimum of three judges. It used the words 'shall be heard and disposed'. Thus, the Federal Court must hear and dispose the matter by a minimum of three judges. In the present case, there was a period where leave applications were heard only by two judges. It was a clear violation of s 74 of the CJA. There had been a coram failure.

[41] In light of the above conclusion, we find it unnecessary to consider the other arguments advanced by both sides. We hold that this is another rare but an appropriate case for the exercise of the inherent power of this court as envisaged in r 137.

[42] For the above reasons, the review applications are allowed. The decision of this court on the leave applications dated 21 April 2010, is set-aside. We make an order that the leave applications be reheard by a newly constituted panel of this court.

Leave applications ordered to be reheard by a newly constituted panel.

Reported by Kohila Nesan